

SERVICE DATE - JUNE 26, 1997

SURFACE TRANSPORTATION BOARD¹

No. 41670

SHELL CHEMICAL COMPANY and SHELL OIL COMPANY
v.
BOSTON & MAINE CORPORATION, *ET AL.*

Decision No. 19²

Decided: June 20, 1997

This decision addresses complainants' second motion to compel, filed April 3, 1997, and complainants' petition, filed May 15, 1997.

BACKGROUND

The Complaint. By complaint filed December 24, 1995, Shell Chemical Company and Shell Oil Company (complainants or Shell)³ allege that numerous railroads are charging, in violation of 49 U.S.C. 10701a, unreasonable rates on complainants' shipments of polyethylene terephthalate (PET) from and to certain points. The rates complained of are the carload rates applicable on shipments of PET: (1) from Apple Grove, WV, to certain points in Alabama, Arizona, California, Delaware, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Ontario, Pennsylvania, Quebec, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin, "among other destinations"; and (2) from Darlington, SC, to Apple Grove, WV.⁴ Complainants request an award of two years' reparations (in the amount of approximately \$3.75 million) pursuant to 49 U.S.C. 11705(b)(2) and 11706(c)(1), and request that the Board prescribe reasonable rates for future application pursuant to 49 U.S.C. 10704(a)(1).

The Defendants. The 22 remaining defendants are: Boston & Maine Corporation (B&M); Buffalo & Pittsburgh Railroad, Inc. (B&P); Canadian National Railway (CN); Chicago and North Western Railway Company (CNW);⁵ Consolidated Rail Corporation (Conrail); CSX Transportation, Inc. (CSXT);⁶ Gateway Western Railway Company (GWWR);⁷ Great Walton

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to new 49 U.S.C. 10701. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² This decision is the 19th issuance served by the Board in this proceeding; none was served by the ICC. Each of the first 18 issuances, none of which was numbered, was denominated as either a decision, a notice, or an order. This decision has been numbered to facilitate references in future decisions. Any future decisions will also be numbered.

³ Shell Chemical Company was formerly a division of Shell Oil Company.

⁴ Complainants, in their second motion to compel filed April 3, 1997, have indicated (at 2 n.1) that the inbound rates challenged in their complaint have reference to traffic moving from Wellman, SC, to Apple Grove. It is not clear whether Darlington (referenced in the complaint) and Wellman (referenced in the second motion to compel) represent one origin or two.

⁵ On October 1, 1995, defendant CNW was merged into defendant UPRR.

⁶ Defendant CSXT is the only rail carrier that directly serves complainants' Apple Grove facility.

⁷ By letter dated May 3, 1996, complainants indicated that GWWR has acquired the status
(continued...)

Railroad Company, Inc. (GWRC); Illinois Central Railroad Company (IC); Indiana Harbor Belt Railroad Company (IHB); Louisville & Indiana Railroad Company (L&I); Missouri Pacific Railroad Company (MPRR);⁸ Modesto and Empire Traction Company (M&E); Providence and Worcester Railroad Company (P&W); St. Louis Southwestern Railway Company (SSW); Salt Lake, Garfield and Western Railway Company (SLG&W); South Carolina Central Railroad Company, Inc. (SCC); Southern Pacific Transportation Company (SPT); ST Rail System (ST); The Columbus & Ohio River Rail Road Company (C&OR); Union Pacific Railroad Company (UPRR); and Washington Central Railroad Company, Inc. (WCRC).⁹

The Answer. By answer filed February 20, 1996, defendants asserted that the ICC had not had and that the Board does not have jurisdiction to assess the reasonableness of the rates challenged in the complaint. Defendants also denied complainants' allegations that the challenged rates are unreasonable, that complainants are entitled to reparations, and that complainants are entitled to rate prescription.¹⁰

Motion To Bifurcate. By motion filed February 20, 1996, defendants requested: that this proceeding be bifurcated into separate market dominance and rate reasonableness phases; and that a procedural schedule be established to govern the market dominance phase.¹¹

Motion For A More Definite Statement. By motion filed February 20, 1996, defendants requested an order directing that the complaint be amended to provide additional and more specific information with respect to certain matters.¹²

Motion For Entry Of Procedural Order. By motion filed March 7, 1996, all but one of the defendants named in the complaint (the one exception being GWWR) moved for the entry of an order establishing a procedural schedule similar to that suggested in defendants' motion to bifurcate (filed February 20, 1996) and in complainants' reply thereto (filed March 1, 1996).

⁷(...continued)

of a “non-litigating defendant” for the purposes of this proceeding. This is apparently intended to mean that GWWR has agreed: to allow the other defendants to litigate the liability issues on its behalf; and to be bound by any reparations award (and presumably any rate prescription) entered in this proceeding. As noted in the letter dated May 3, 1996, complainants' acquiescence in GWWR's status as a “non-litigating defendant” has effectively mooted complainants' motion “to compel and for sanctions” filed April 22, 1996 (wherein complainants alleged that GWWR had failed to respond to complainants' first set of interrogatories).

⁸ On January 1, 1997, defendant MPRR was merged into defendant UPRR.

⁹ The complaint filed December 24, 1995, named 27 defendants, but the complaint has since been dismissed with prejudice as to certain defendants, and there are now 22 remaining defendants.

¹⁰ In the answer, which was apparently filed on behalf of all but one of the 27 defendant railroads named in the complaint (the one exception being GWWR), the defendants also contended: that the majority (55%) of all outbound PET shipments from complainants' Apple Grove facility within the relevant limitations period were made under contract, and are therefore immune from rate reasonableness challenge under 49 U.S.C. 10713(i)(1); and that all (100%) of the inbound PET shipments to complainants' Apple Grove facility within the relevant limitations period were made under contract, and are therefore similarly immune from rate reasonableness challenge. The defendants further contended, in their answer: that the complaint is barred, in whole or in part, by section 229 of the Staggers Rail Act of 1980; that the Board lacks jurisdiction to award reparations or impose a rate prescription on defendant CN because the service provided by CN is provided entirely within Canada; and that “one or more” of the defendants are switch carriers that do not participate in line-haul movements of PET under the challenged rates.

¹¹ By reply filed March 1, 1996, complainants indicated that they agreed that the proceeding should be bifurcated and that the market dominance phase should be handled expeditiously.

¹² By reply filed March 1, 1996, complainants, though arguing that there was no need to amend the complaint to provide defendants with more information, undertook to clarify certain matters. In particular, complainants clarified that there were no additional shipment destinations beyond those identified in the complaint.

Proceeding Instituted; Procedural Schedule Established; Certain Pending Motions Resolved Or Deferred. By decision served April 15, 1996: a proceeding was instituted to determine the reasonableness of rates charged by the defendant railroads on complainants' shipments of PET; a procedural schedule was established for the submission of evidence and argument on the issue of market dominance; the motion to bifurcate was ordered held in abeyance, pending receipt of the submissions on the market dominance issue;¹³ and the motion for a more definite statement was denied. The procedural schedule with respect to the market dominance issue included the following dates: June 14, 1996 (completion of discovery by all parties); July 15, 1996 (simultaneous submission of opening evidence); August 13, 1996 (simultaneous submission of reply evidence); and September 3, 1996 (simultaneous submission of rebuttal evidence). The decision served April 15, 1996, also indicated (slip op. at 2 n.2) that a motion to dismiss filed March 26, 1996, by IHB, L&I, and WCRC would be ruled on at a later date.¹⁴

Complainants' First Interrogatories. On March 1, 1996, complainants submitted their "first set of interrogatories" to defendants. On April 1, 1996, defendants submitted their "objections and responses" to complainants' first set of interrogatories. On April 5, 1996, complainants filed a motion to compel defendants to answer "forthrightly and completely" complainants' first set of interrogatories. On April 25, 1996, defendants filed a reply to the motion to compel.

Defendants' First Interrogatories. On March 18, 1996, defendants submitted their "first set of interrogatories" to complainants. On April 24, 1996, complainants submitted their "objections and responses" to defendants' first set of interrogatories. On May 6, 1996, defendants filed a motion to compel complainants to answer "fully" defendants' first set of interrogatories. On May 24, 1996, complainants filed a reply to the motion to compel.¹⁵

Request For Appointment Of Staff Member To Oversee Discovery. By letter dated April 17, 1996, complainants and defendants jointly requested that the Board appoint a qualified staff member from the Office of Proceedings to oversee the discovery process and to resolve discovery disputes in the first instance.

ALJ Assigned. By decision served May 10, 1996, Administrative Law Judge Ronnie A. Yoder (ALJ Yoder) was assigned "to entertain and rule on discovery disputes that may arise" in this proceeding. *See also* the notice served May 16, 1996 (correcting the "decided date" in the decision served May 10, 1996).¹⁶

Procedural Schedule Modification Motion. By motion filed May 30, 1996, complainants and defendants jointly moved to modify the procedural schedule that had been established in the

¹³ Although the parties appear to be under the impression that this proceeding has been bifurcated, *see, e.g.*, complainants' second motion to compel (filed April 3, 1997) at 2 & n.2, the fact of the matter is that, pursuant to the decision served April 15, 1996, the motion to bifurcate has been held in abeyance, pending receipt of the submissions on the market dominance issue. It was noted in that decision, slip op. at 2: "Upon receipt of these submissions [on the market dominance issue], the Board will decide whether to issue a decision at that time on the question of market dominance."

¹⁴ The dismissal motion filed March 26, 1996, by IHB, L&I, and WCRC remains outstanding. A second dismissal motion filed April 30, 1996, by IHB, L&I, and WCRC also remains outstanding. Complainants have apparently agreed that, as to IHB, L&I, and WCRC, discovery will be held in abeyance pending a decision on the two dismissal motions. *See* the letter dated March 26, 1996, by Christopher E. Kaczmarek (counsel for IHB, L&I, and WCRC); *see also* defendants' supplemental responses (submitted July 26, 1996) to complainants' first set of interrogatories (indicating, at 1 n.1, that discovery with respect to IHB, L&I, and WCRC is being held in abeyance pending resolution of their dismissal motions).

¹⁵ The competing motions to compel reflected, in large part, competing notions as to the scope of the protective order to be entered in this proceeding. *See* the motion for a protective order filed April 26, 1996, by defendants (all except GWWR); the reply thereto filed May 16, 1996, by complainants; and the petition filed May 15, 1996, by Keller and Heckman LLP, a Washington, D.C.-based law firm (K&H), for leave to intervene in this proceeding for the limited purpose of addressing the protective order motion filed April 26, 1996.

¹⁶ The decision served May 10, 1996, was "embraced" in a decision issued in *New Jersey Steel Corporation--Petition for Declaratory Order--Certain Practices of Consolidated Rail Corporation*, No. 41649. The notice served May 16, 1996, was similarly "embraced" in a notice issued in the *New Jersey Steel Corporation* proceeding.

decision served April 15, 1996. The parties requested that the June 14, 1996, deadline for the completion of discovery on market dominance issues be suspended until such date as might be established by ALJ Yoder for the completion of discovery. The parties further requested that the evidentiary schedule be modified to provide: that opening market dominance evidence would be filed 45 days after the completion of discovery; that reply market dominance evidence would be filed 90 days after the completion of discovery; and that rebuttal market dominance evidence would be filed 110 days after the completion of discovery.¹⁷

Discovery Disputes Resolved. By “Order of Administrative Law Judge Resolving Discovery Disputes” served June 18, 1996, ALJ Yoder resolved all of the then-outstanding discovery disputes that had arisen in this proceeding. The rulings made by ALJ Yoder with respect to these discovery disputes are reflected in the transcript of the prehearing conference held June 10, 1996. *See* “Order Correcting Transcript of June 10, 1996” (order served August 22, 1996; correction served September 4, 1996) and “Prehearing Conference Decision of Administrative Law Judge Ronnie A. Yoder” (decision served August 22, 1996; correction served September 4, 1996).¹⁸

Supplemental Discovery Responses. On July 9, 1996, complainants submitted their “supplemental responses” to defendants’ first set of interrogatories. On July 26, 1996, defendants submitted their “supplemental responses” to complainants’ first set of interrogatories.¹⁹

Document Production. Defendants answered most of complainants’ interrogatories by producing documents said to be responsive thereto. *See* 49 CFR 1114.26(b) (production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document). Defendants’ document production began even prior to the submission of their “supplemental responses” on July 26, 1996,²⁰ and, at least with respect to defendant CSXT, such document production continued into the second half of April 1997.²¹ Document production by defendant CSXT alone has been substantial: over 3,000 pages of documents, by complainants’ account;²² over 5,000 pages of documents, by CSXT’s account.²³

¹⁷ The motion filed May 30, 1996, appears not to have been acted upon in a formal manner. Nevertheless, the parties appear to have worked out a *de facto* suspension of the procedural schedule.

¹⁸ By “Stipulated Protective Order” also served June 18, 1996, a protective order applicable “to all documents and other products of discovery obtained by any party to [this proceeding] pursuant to discovery requests made in this proceeding” was entered by ALJ Yoder. This protective order was “stipulated,” i.e., it was agreed to by the parties; and the parties apparently also agreed to certain revisions ordered by ALJ Yoder. *See* the “joint status report on resolution of discovery disputes and motion to adopt stipulated protective order” filed June 5, 1996, at 2. *See also* the protective order served June 18, 1996, at cover pp. 1-2. The stipulated protective order apparently resolved all of the then-pending protective order motions, including: the protective order motion filed March 26, 1996, by IHB, L&I, and WCRC; the protective order motion filed April 26, 1996, by defendants generally (all except GWWR); and the protective order intervention petition filed May 15, 1996, by K&H.

¹⁹ The term “defendants,” as used in the July 26 pleading, included all of the then-remaining defendants except: GWWR (which, as a non-litigating defendant, was not participating in the joint defense); and IHB, L&I, and WCRC (which, per agreement with complainants, were holding discovery in abeyance pending resolution of their dismissal motions filed March 26, 1996, and April 30, 1996).

²⁰ *See, e.g.*, defendants’ reply to complainants’ second motion to compel, filed April 23, 1997, at 3 n.1.

²¹ *See* defendants’ reply to complainants’ second motion to compel, filed April 23, 1997 (Attachment A at 7, second full paragraph).

²² *See* complainants’ second motion to compel, filed April 3, 1997, at 3. *See also* complainants’ petition filed May 15, 1997, at 4 (CSXT alone has produced, after July 1996, “five thousand documents”).

²³ *See* defendants’ reply to complainants’ second motion to compel, filed April 23, 1997 (Attachment A at 6).

Additional Discovery Dispute. By “second motion to compel” filed April 3, 1997 (hereinafter referred to as the 4/3/97 motion), complainants seek an order compelling defendants to answer “forthrightly and completely” complainants’ first set of interrogatories (i.e., the set submitted March 1, 1996). By reply filed April 23, 1997 (hereinafter referred to as the 4/23/97 reply), defendants urge the denial of the 4/3/97 motion.²⁴

Assignment Revoked. By decision served May 14, 1997, the assignment to ALJ Yoder to entertain and rule on discovery disputes in this proceeding was revoked. That decision indicates that, unless otherwise ordered, the Board itself will address the additional discovery dispute presented by the 4/3/97 motion and also any future discovery disputes that may arise in this proceeding.

Additional Pleadings. By petition filed May 15, 1997 (hereinafter referred to as the 5/15/97 petition), complainants have asked that a hearing be set on their 4/3/97 motion or, in the alternative, that they be granted leave to file a reply to the 4/23/97 reply. By reply filed June 4, 1997 (hereinafter referred to as the 6/4/97 reply), defendants urge the denial of the 5/15/97 petition.²⁵

DISCUSSION AND CONCLUSIONS

The 5/15/97 Petition. Complainants indicate, in essence, that they expected that their 4/3/97 motion would be acted upon by ALJ Yoder, and that they further expected that ALJ Yoder, prior to acting upon their motion, would provide an opportunity for the presentation of evidence and argument with respect thereto. Complainants further indicate, in essence, that their 4/3/97 motion would have been more thoroughly documented had they had reason to anticipate that they would not be having an opportunity to present further evidence and argument. Complainants therefore request that we schedule a hearing on their 4/3/97 motion, or, at the very least, that we grant complainants leave to reply to the 4/23/97 reply filed by defendants.

Complainants’ request, though at first blush appealing on due process grounds, ultimately fails (i) because the 5/15/97 petition effectively constitutes the additional reply that complainants seek leave to file,²⁶ and (ii) because the 4/3/97 motion, as supplemented by the 5/15/97 petition, can be decided upon the basis of the pleadings without a hearing. We will therefore deny the 5/15/97 petition.

The 4/3/97 Motion: In General. In their 4/3/97 motion (as supplemented by their 5/15/97 petition) complainants address three topics: a document index; certain allegedly unanswered interrogatories; and an allegedly incomplete search. We shall discuss each in turn.

The 4/3/97 Motion: Document Index. Complainants contend that, although defendants have produced many documents, defendants have refused to provide an index identifying which of the documents are asserted to be responsive to which of the interrogatories. Complainants, contending that the answering party may not answer interrogatories simply by directing the seeking party to an undifferentiated mass of business records that may or may not answer the interrogatories, request that defendants be ordered to produce an index which identifies, by interrogatory, the produced documents said to be responsive to that interrogatory. *See* the 4/3/97 motion at 3-5. The index complainants apparently have in mind: (i) would identify, for each interrogatory, the document or documents said to be responsive thereto; and/or (ii) would identify, for each document, the interrogatory or interrogatories to which the document was said to be responsive. *See* the 5/15/97 petition at 4-5.

²⁴ The 4/23/97 reply was apparently filed on behalf of all of the then-remaining defendants except GWR (the non-litigating defendant) and IHB, L&I, and WCRC (the “held in abeyance” defendants).

²⁵ The 6/4/97 reply was apparently filed on behalf of all of the then-remaining defendants except GWR (the non-litigating defendant) and IHB, L&I, and WCRC (the “held in abeyance” defendants).

²⁶ Complainants have presented, in the 5/15/97 petition, the points they “were going to demonstrate,” “were going to point out,” and “were going to show,” as well as the evidence they “were going to introduce.” *See* the 5/15/97 petition at 3-5. There is no indication in the 5/15/97 petition that this list was intended to be merely illustrative; it appears, rather, to be exhaustive.

Defendants contend: that the documents provided by defendant CSXT²⁷ include summarized information on all of its movements of PET, giving the average rates, tonnages, average revenues, and refunds for each movement; that the transmittal letters for those documents clearly indicated the interrogatories to which those documents were primarily intended to respond, although the information contained in those documents also satisfies other interrogatories as well; that most if not all of the CSXT documents include both “file covers” indicating the files from which such documents were produced and also “sheets” indicating the person or persons responsible for those files; and that the time-consuming task of reviewing and preparing a written index for the “thousands of documents” produced by defendants generally, and indicating, for each document, each interrogatory to which it is responsive, would be far more onerous and burdensome for the defendants than it would be for complainants simply to review the documents to identify the specific information that they seek. Defendants add that they have in fact provided a “list” (defendants do not call it an “index”) of the documents produced by all defendants through July 1996, indicating, for each document or related group of documents, the primary interrogatories to which those documents are responsive. *See* the 4/23/97 reply at 8-9. *See also* the 6/4/97 reply at 3-4.

We conclude that, given the substantial number of documents produced by defendants in general and defendant CSXT in particular, it would have been better had complainants requested and defendants provided a more formal “index” or “list.” At this stage of this proceeding, however, the crucial question is not what would have been better at an earlier stage but, rather, what should be done at the present stage. Complainants have not explained why they simply cannot do as defendants have suggested, i.e., review the documents heretofore produced to ascertain the relevant information contained therein. Under the circumstances, therefore, it appears that a review of the documents by complainants would be no more difficult or burdensome than a review of the documents by defendants, and we need not delay this phase of the proceeding further by requiring such a review by defendants. We will therefore deny the 4/3/97 motion insofar as that motion seeks to compel defendants to provide a formal index.

The 4/3/97 Motion: Unanswered Interrogatories. Insisting that their first set of interrogatories have not been answered fully, complainants request that defendants be ordered to supplement their responses so that each of the interrogatories is answered completely and forthrightly. Complainants specifically request, in this regard, that defendants be required to produce copies of all relevant studies or summaries thereof. *See* the 4/3/97 motion at 5-6. Complainants concede, in their 5/15/97 petition, that defendant CSXT has produced the Plastic Receivers Initiative Study and the 350-page pricing manual which was the product of the McKinsey Study (though complainants note that these two documents were produced only after complainants filed their 4/3/97 motion). Complainants add, however, that CSXT: still has not produced its previous pricing manual; and still has not produced any of the responses obtained from PET receivers in connection with the Plastic Receivers Initiative Study. *See* the 5/15/97 petition at 3.

Defendants insist, in essence, that they have produced copies of all relevant studies that would be responsive to complainants' interrogatories. With respect to the Plastic Receivers Initiative Study, defendants contend: that this study involves not only PET but also numerous other plastic and chemical commodities handled by CSXT; that PET receivers represented only a relatively small segment of this study; that, for the most part, the study involves commercially sensitive marketing information that is not relevant to this proceeding; and that there is no relevant information pertaining to this study that remains to be produced. Defendants add, with respect to the Plastic Receivers Initiative Study, that CSXT “is producing” the spreadsheets prepared for each PET producer, together with any replies provided by those PET producers, and also the November 1996 report on the study finding that the project had been unsuccessful. With respect to the McKinsey Study, defendants note that they have produced the 350-page pricing manual which was the product of that study, but they do not mention the previous pricing manual that complainants seek. *See* the 4/23/97 reply at 6-8, and Attachment A thereto at 5-6. *See also* the 6/4/97 reply at 3.

Complainants' arguments with respect to studies appear to have been narrowed down to, and are certainly specific only with respect to, the Plastic Receivers Initiative Study and the McKinsey Study. For this reason, we will deny the 4/3/97 motion insofar as that motion is directed to studies other than the Plastic Receivers Initiative and McKinsey Studies.

With respect to the Plastic Receivers Initiative Study, we conclude that defendants have made all the production to which complainants are entitled. Although complainants have argued vigorously that PET is a “chemical” and that CSXT groups its chemicals marketing personnel with

²⁷ Complainants and defendants apparently agree that, as respects document production, CSXT is the key defendant.

its plastics marketing personnel,²⁸ the fact remains that the only commodity at issue in this proceeding is PET, not chemicals in general and not plastics in general. For this reason, we will deny the 4/3/97 motion insofar as that motion is directed to the Plastic Receivers Initiative Study.²⁹

With respect to the McKinsey Study, we conclude that, except as indicated in the next paragraph, defendants have made all the production to which complainants are entitled. For this reason, we will, except as indicated in the next paragraph, deny the 4/3/97 motion insofar as that motion is directed to the McKinsey Study.

Complainants claim that defendants have not produced the pricing manual that was used prior to the preparation of the 350-page pricing manual which was the product of the McKinsey Study. Defendants have neither admitted nor denied this claim, nor indeed have they addressed it at all. We are therefore providing that, in accordance with the procedural schedule set out in ordering paragraphs 3, 4, and 5 at the end of this decision: CSXT must either produce to complainants the previous pricing manual (or a redacted version thereof) or file with the Board objections to such production; if CSXT either produces a redacted version or files objections, complainants may file a motion to compel; and, if complainants file a motion to compel, defendants may file an answer thereto.

The 4/3/97 Motion: Incomplete Search. Complainants contend that their examination of the documents that defendants have produced indicates that there appears to have been no search of the files of 39 named CSXT officers and employees identified in the produced documents as likely custodians of relevant documents. Complainants therefore request that defendants be ordered to supplement their responses to complainants' first set of interrogatories by providing comprehensive and accurate responses to each of them, by which complainants have in mind (in this context) the identification or production of responsive documents contained in the files of the 39 named CSXT officers and employees. *See* the 4/3/97 motion at 6-9. *See also* the 5/15/97 petition at 4.

Defendants insist that, even prior to the filing of the 4/3/97 motion, defendant CSXT had made a good faith search of its files and had produced to complainants numerous responsive documents disclosed by that search. Defendants add that, after receiving the 4/3/97 motion, defendant CSXT made detailed follow-up inquiries, including specific additional inquiries regarding the files of those individuals identified in the motion to compel. Defendants insist that CSXT has produced all responsive documents that it has identified, including a few documents that were turned up by the follow-up inquiries triggered by the 4/3/97 motion. *See* the 4/23/97 reply at 2-6 (identifying, by name, 38 of the 39 CSXT officers and employees named by complainants; the one exception, for which there appears to be no explanation, is Harry A. Bunn). *See also* the 6/4/97 reply at 2.

Subject to the possible exception indicated in the next paragraph, we accept defendants' representations: that defendant CSXT has made a good faith inquiry of all persons identified by complainants to assure that all responsive documents have been produced;³⁰ that defendant CSXT has produced all responsive documents that its inquiries have disclosed; and that there are no further documents that should be produced by defendant CSXT. Therefore, except as indicated in the next paragraph, we will deny the 4/3/97 motion insofar as that motion alleges an incomplete search of CSXT's files.

With respect to three named individuals, however, we are troubled by a seemingly inexplicable discrepancy. Defendants, in their reply filed 4/23/97, stated that CSXT has produced, among other documents, "documents of" John Anderson, J. E. Giles, and Richard L. Karn. *See* the 4/23/97 reply at 4. Subsequently, complainants, in their petition filed 5/15/97, stated that CSXT has "produced not a single document . . . from the files of" John G. Anderson, J. E. Giles, and

²⁸ *See* the 5/15/97 petition at 3-4.

²⁹ As respects the Plastic Receivers Initiative Study, our denial of the 4/3/97 motion rests upon the assumption that the materials referenced in defendants' 4/23/97 reply, Attachment A at 6 (i.e., the spreadsheets prepared for each PET producer, together with any replies provided by those PET producers, and also the November 1996 report on the study finding that the project had been unsuccessful), have by now been provided to complainants.

³⁰ Because complainants, in their petition filed 5/15/97, have not raised an issue respecting defendants' failure to mention Mr. Bunn by name in defendants' reply filed 4/23/97, it should be safe to assume that complainants have concluded that, with respect to Mr. Bunn, there is no issue to be raised.

Richard L. Karn. *See* the 5/15/97 petition at 4. Unless either complainants or defendants are being exceedingly clever in their choice of words, there would appear to be an irreconcilable discrepancy in these statements. Because this discrepancy raises a question concerning the integrity of our proceedings, we will direct the parties to resolve this matter in accordance with the procedural schedule set out in ordering paragraphs 6, 7, 8, and 9 at the end of this decision.³¹

Motions To Dismiss. The motions to dismiss filed March 26, 1996, and April 30, 1996, by IHB, L&I, and WCRC will be addressed in a subsequent decision, which we will issue as promptly as practicable.

Status Reports: Market Dominance. We will require complainants and defendants to file on a regular basis, jointly if possible but separately if necessary, status reports discussing in some detail the progress that has been made in completing discovery on the issue of market dominance. Such reports should be filed with the Board on the first business day of each month, beginning with the month of August 1997. Each such report should include, among other things, either a target date on or before which discovery on the issue of market dominance will be completed or a date certain on which such discovery was completed.

Procedural Schedule: Market Dominance. The procedural schedule established in the decision served April 15, 1996 (for the submission of evidence and argument on the issue of market dominance) appears to have been suspended by agreement of the parties. When the parties announce that discovery on the issue of market dominance has been completed, we will issue a decision containing a new procedural schedule applicable to the submission of evidence and argument on that issue.³² That schedule, which will be patterned upon the schedule proposed in the joint motion filed May 30, 1996, will provide for the simultaneous submission of: opening market dominance evidence and argument, 45 days after the completion of discovery; reply market dominance evidence and argument, 90 days after the completion of discovery; and rebuttal market dominance evidence and argument, 110 days after the completion of discovery.³³

Motion To Bifurcate. As ordered in the decision served April 15, 1996, the motion to bifurcate filed February 20, 1996 (asking that this proceeding be bifurcated into separate market dominance and rate reasonableness phases) will be held in abeyance pending receipt of the submissions on the market dominance issue.

Diskette Submissions. In addition to submitting the usual paper copies of all pleadings filed with the Board, the parties shall also submit, on diskettes, tapes, or compact discs, copies of all textual materials, electronic workpapers, data bases, and spreadsheets used to develop quantitative evidence. The data contained on the diskettes, tapes, or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies are submitted under seal), and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate expedited review by the Board and its staff.³⁴

³¹ Two other individuals, L. M. Kellerman and W. J. Landes, are also listed by complainants as being among those individuals with respect to whom CSXT has “produced not a single document . . . from the files of.” *See* the 5/15/97 petition at 4. With respect to these two individuals, however, there would appear to be no discrepancy, because defendants have stated that these two individuals are among those individuals who simply have no documents relevant to this proceeding. *See* the 4/23/97 reply at 5.

³² That decision will also terminate the requirement respecting the filing of status reports.

³³ The parties should take note that the procedural schedule we intend to adopt will require submissions to be made 45, 90, and 110 days after the completion of discovery, not 45, 90, and 110 days after the service date of the decision adopting the procedural schedule. Because the decision adopting the procedural schedule will necessarily be issued after the completion of discovery, that schedule will effectively require these submissions to be made x, y, and z days after the service date of that decision (where x is less than 45, y is less than 90, and z is less than 110).

³⁴ Data must be submitted on 3.5-inch IBM-compatible floppy diskettes, QIC-80 tapes (in uncompressed form), or compact discs. Textual materials must be in, or convertible into, WordPerfect 7.0. Electronic spreadsheets must be in Lotus 1-2-3 Release 5. A copy of each diskette, tape, or compact disc submitted to the Board should be provided to any other party upon request.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainants' petition filed May 15, 1997, is denied.
2. Except as otherwise indicated in this decision, complainants' second motion to compel, filed April 3, 1997, is denied.
3. By July 3, 1997, defendant CSXT must either: (i) produce to complainants the pricing manual (or a redacted version thereof) that preceded the 350-page pricing manual which was the product of the McKinsey Study; or (ii) file with the Board objections to such production.
4. If CSXT, acting in accordance with the preceding ordering paragraph, either produces a redacted version or files objections, complainants may, by July 10, 1997, file a motion to compel.
5. If complainants, acting in accordance with the preceding ordering paragraph, file a motion to compel, defendants may file an answer thereto by July 17, 1997.
6. Complainants must file, by July 3, 1997, a statement either affirming or retracting their allegation that CSXT has "produced not a single document . . . from the files of" John G. Anderson, J. E. Giles, and Richard L. Karn. Complainants may, if appropriate, affirm in part and retract in part.
7. If complainants affirm, in whole or in part, the allegation referenced in the preceding ordering paragraph, defendant CSXT must file, by July 10, 1997, either: (a) a statement acknowledging that the allegation referenced in the preceding ordering paragraph, to the extent affirmed by complainants, is factually accurate; or (b) copies of any documents it has heretofore provided to complainants that, in its opinion, demonstrate that the allegation referenced in the preceding ordering paragraph, to the extent affirmed by complainants, is factually inaccurate. CSXT may submit any such copies under seal.
8. If defendant CSXT makes a submission under the preceding ordering paragraph, complainants may reply thereto by July 17, 1997.
9. If complainants make a reply under the preceding ordering paragraph, defendant CSXT may submit rebuttal thereto by July 24, 1997.
10. Complainants and defendants must file, on the first business day of each month beginning with the month of August 1997, status reports discussing the progress made in completing discovery on the issue of market dominance.
11. The parties shall submit all pleadings both in the required paper form and also as computer data contained on diskettes, tapes, or compact discs.
12. This decision is effective on June 26, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary